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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JACK SCHMIDLING, LARRY CLARK, DEBRA LYNN PETRO and RICH HYERCZYK,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where conduct does not involve a fundamental right, does Art. III allow standing to persons seeking a declaratory judgment that an ordinance is unconstitutional and to enjoin its enforcement where two of them were repeatedly prosecuted although not convicted, and fifth citizen engaged in identical conduct is currently being prosecuted.

II. Is the Art. III standing test announced by the Court of Appeals too stringent where in order to satisfy it a plaintiff must demonstrate facts which implicate *Younger v. Harris*.

LIST OF PARTIES

The original parties in the United States District Court for the Northern District of Illinois were the plaintiffs, Jack Schmidling, Larry Clark, Mike Regenfuss, Debra Lynn Petro and Richard Hyerczyk and the defendants, the City of Chicago, Illinois and Richard M. Daley, its mayor, in his official capacity.

Mayor Daley was dismissed by the District Court because a suit against him in his official capacity is the same as a suit against the City. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Mayor Daley was not a party in the appeal and is not a party.

Mr. Regenfuss has moved from the City of Chicago and is also not a party to this petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I.	
The Opinion Of The Court Of Appeals Limits Standing In Non-Fundamental Civil Rights Cases In Contradiction Of This Court's Precedent	6
II.	
Satisfaction Of The Court Of Appeals Test For Standing Implicates *Younger v. Harris*	9
CONCLUSION	10

APPENDICES

A—Opinion of the United States Court of Appeals, July 22, 1993	App. 1
B—Memorandum Opinion and Order of the United States District Court, January 15, 1992	App. 16

TABLE OF AUTHORITIES

Cases	PAGE
Almodavar v. Reiner, 832 F.2d 1138 (9th Cir. 1987) ..	9
Arlington Heights v. Schroeder, 28 Ill.App.3d 1, 328 N.E.2d 74 (1st Dist. 1975)	5
Babbit v. United Farm Workers Union, 442 U.S. 289 (1979)	6
Bowers v. Hardwick, 478 U.S. 186 (1986)	6
City of Houston v. Hill, 482 U.S. 451 (1987)	6, 7
DeSpain v. Johnson, 731 F.2d 1171 (5th Cir. 1984) ..	9
Doran v. Salem Inn, 422 U.S. 922 (1975)	8
Epperson v. Arkansas, 393 U.S. 97 (1968)	6
Georgetown v. Vanaman, 1988 WL 7388 (Del. Ch.) ..	5
Kentucky v. Graham, 473 U.S. 159 (1985)	ii
Mitchum v. Foster, 407 U.S. 225 (1972)	10
Monaghan v. Deakins, 798 F.2d 632 (3rd Cir. 1986) ..	9
New Orleans Pub. Serv. v. Council of New Orleans, 491 U.S. 350 (1989)	10
Newark v. Garfield Development Corp., 25 Ohio Misc.2d 4, 495 N.E.2d 480 (1986)	5
Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986)	6
Potomac Electric Power v. Sach, 802 F.2d 1527 (4th Cir. 1986)	9
Schmidling v. City of Chicago, 1 F.3d at 501 (Reynolds, J. concurring)	3

Steffel v. Thompson, 415 U. . 452 (1974) 6, 8

United States v. SCRAP, 412 U.S. 669 (1973) ... 6

Valley Forge Christian College v. Americans For Separation of Church and State, 454 U.S. 464 (1982) 6

Younger v. Harris, 401 U.S. 37 (1971) 9

Statutes Involved

Municipal Code of Chicago § 7-28-120(a)-(b) (1990) .. 2

Other Authorities

Cioni, T., *The Unkindest Cut of All*, MILW.J. (Aug. 25, 1993) 7

Nash, J., *Gardening Nature's Way; Back-To-Natives Movement Bringing Ecological Harmony To the American Backyard*, TIME, May 17, 1993 . 7

Sabastian, P., *Mowers, Growers Now Quarreling Over the Back Fence—New Little Wildlife Habitat Pop-Up Like Daffodils; Cultivators Are Vexed*, WALL.ST.J., Apr. 17, 1991 7

The Supreme Court, 19 TERM, 85 HARV. L. REV. 40 (1971) 9

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JACK SCHMIDLING, LARRY CLARK, DEBRA LYNN PETRO and RICH HYERCZYK,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners Jack Schmidling, Larry Clark, Debra Lynn Petro and Rich Hyerczyk respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on July 22, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 1 F.3d 494 (7th Cir. 1993). This opinion is reproduced as Appendix A. The opinion of the District Court for the Northern District of Illinois, Eastern Division, is reported at 1992 WL 14112. It is reproduced as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioners brought suit in the Northern District of Illinois. On January 15, 1992, the Northern District granted the respondent's motion to dismiss.

On petitioners' appeals, the Seventh Circuit on July 22, 1993, entered a judgment and an opinion affirming the Northern District's order and directing that petitioners' complaint be dismissed. No petition for rehearing was sought. Jurisdiction in this Court is based on 28 U.S.C. § 1254.

STATUTES INVOLVED

Municipal Code of Chicago § 7-28-120(a)-(b) (1990):

> (a) Any person who owns or controls property within the city must cut or otherwise control all weeds on such property so that the average height of such weeds does not exceed 10 inches. Any person who violates this subsection shall be subject to a fine of not less than $50.00 nor more than $150.00. Each day that such violation continues shall be considered a separate offense.
>
> (b) All weeds which have not been cut or otherwise controlled, and which exceed an average height of 10 inches, are hereby declared to be a public nuisance. If any person has been convicted of violating subsection (a) and has not cut or otherwise controlled any weeds as required by this section within 10 days after the date of the conviction, the city may cause any such weeds to be cut at any time. In such event, the person who owns or controls the property on which the weeds are situated shall be liable to the city for all costs and expenses incurred by the city in cutting the weeds.

STATEMENT OF THE CASE

Plaintiffs are part of a group of homeowners choosing to landscape with native plants rather than conventional, exotic grasses which usually require more fertilizers, pesticides and watering.[1] "Depending on your point of view" the plaintiffs' yards, cultivated with native Illinois prairie plants and wildflowers, are a "garden or weed-patch." *Schmidling v. City of Chicago*, 1 F.3d at 501 (Reynolds, J. concurring). Generally, these native plants grow higher than ten inches. The Plaintiffs do not cut these plants; doing so would destroy them. Chicago's weed ordinance says "any person who owns or controls property within the city must cut or otherwise control all weeds on such property so that the average height . . . does not exceed 10 inches." By other terms, violators "shall be" fined "not less than $50.00 nor more than $150.00" for each day the "weeds" on their property are in violation.

Jack Schmidling cultivates a native landscape of 110 varieties of Illinois prairie, woodland and wetland plants and wildflowers. By his count, it has attracted 64 different species of birds. Schmidling was prosecuted for violating the ordinance in 1987, 1988, and 1989. Each time, prose-

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[1] Plaintiffs, mostly, grow these plants because natural landscapes increase biodiversity, create habitat beneficial for birds and insects and provide resting and feeding grounds for migrating birds. Compared with traditional, exotic lawns, natural landscapes are more environmentally beneficial as the native plants do not suggest the use of toxic and harmful contaminants. These benefits are recognized by others—including the City of Chicago which cultivates a native prairie of wildflowers, legumes and grasses at The David Lee Animal Control Center on the near south side. The Cook County Forest Preserve District, Chicago Park District and Illinois Department of Transportation are engaged in similar programs and also cultivate native prairies in Chicago.

cution stopped after he wrote the City explaining his reasons for growing a native landscape.

Larry Clark cultivates a natural landscape consisting of a savanna, a prairie, a wetland, and an experimental garden. He hopes to preserve rare and threatened plants and educate people on the need to preserve them. Like Schmidling, Clark has been repeatedly prosecuted for violating the weed ordinance. Each prosecution was resolved without conviction.

Debra Petro and Rich Hyerczyk grow native Illinois prairie and savanna plants. Neither has ever been cited for violating the weed ordinance, but both allege genuine fears of prosecution because of the prosecutions of other natural gardeners.

Marie Wojciechowski, who is not a plaintiff, is trying to establish a native landscape at her Chicago home. In 1989, Wojciechowski was prosecuted for allegedly violating the weed ordinance and, under another ordinance, for accumulating debris on her property. After a trial, she was ordered to clean up the debris, cut some plants so that they wouldn't encroach on a neighbor's yard and pay a $110.00 fine and court costs. She was cited again in 1990 and the case is still pending. If found guilty, she could be fined under the terms of the weed ordinance at least $24,000 and at most $72,000. To enforce payment, the city can impose a lien on her home.[2]

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[2] The ordinance at issue here became effective December 20, 1989. The prior version of the law is reprinted in App. A at n. 2. The two versions are not materially different for purposes of the issues raised in this case.

Plaintiffs allege three causes of action:

1. The weed ordinance, on its face and as applied, violates the Due Process Clause of the 14th Amendment by not defining the ambiguous and vague term "weed";

2. The weed ordinance, on its face and as applied, violates the Due Process Clause of the 14th Amendment by not defining what is meant by the term "average" or specifying the time, place or manner of determining the "average" height; and

3. The weed ordinance violates the Due Process and Equal Protection Clauses of the 14th Amendment by not being rationally related to any articulated government interest.

Unlike state law, 505 ILCS 100/1 (1992) (formerly Ill.Rev. Stat. 1991, ch. 5, ¶ 951); Ill. Admin. Code, ch. 1, § 220.60 (1991 supp.) (containing a list of prohibited plants), the Chicago weed ordinance does not define the term "weed." Its common meaning is simply an unwanted plant. *Webster's New World Dictionary* (2d Ed.). Plaintiffs believe the term is subjective, arbitrary and vague. *See Arlington Heights v. Schroeder*, 28 Ill.App.3d 1, 328 N.E.2d 74, 76 (1st Dist. 1975) ("weed" is ambiguous) and that their due process rights are being violated. *Newark v. Garfield Development Corp.*, 25 Ohio Misc.2d 4, 495 N.E.2d 480, 484 (1986) ("weed" is unconstitutionally vague term); *Georgetown v. Vanaman*, 1988 WL 7383 (Del. Ch.) (same). "Average" is also not defined, nor is the manner of computing it, thus compounding the vagueness.

REASONS FOR GRANTING THE WRIT

I.

The Opinion Of The Court Of Appeals Limits Standing In Non-Fundamental Civil Rights Cases In Contradiction Of This Court's Precedent.

A party has standing to challenge a law if the complaint alleges some injury in fact that can be fairly traced to the challenged law and if redress is likely by a favorable decision. *Valley Forge Christian College v. Americans For Separation of Church and State*, 454 U.S. 464, 472 (1982). The burden is not onerous. *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973). To fulfill the actual injury requirement in a case challenging a criminal or quasi-criminal statute, the plaintiffs must show "a reasonable threat of prosecution." *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 625, n.1 (1986); *City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987); *Babbit v. United Farm Workers Union*, 442 U.S. 289, 298 (1979).

Here, before suit was filed, two petitioners were repeatedly prosecuted for violating the ordinance. Schmidling was prosecuted three times; Clark twice. Additionally, Wojciechowski was and still is being prosecuted. Petitioners and Wojciechowski engage in the same activity. As a result of all this, each petitioner has a genuine fear of prosecution. These facts satisfy the requirements of the ripeness and standing doctrines. *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); *see, e.g., Bowers v. Hardwick*, 478 U.S. 186, 188 (1986) (plaintiff arrested, charges dropped); *Hill*, 482 U.S. 451 (plaintiff arrested four times, never convicted); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (teacher not criminally charged).

The court of appeals held that all petitioners lack standing because the prosecutions of Clark and Schmidling were

remote in time, had been discontinued and, therefore, could not lead to present, genuine fears. But, prosecutions for gardening in Chicago are only likely to occur in the spring or summer, not year-round; so, prosecutions should not be expected any more frequently than annually. The repeated prosecutions of Clark, three years apart, show the outside limit (according to the record) of the interval between repeat prosecutions. This suit was filed in early June, 1991 in anticipation of what had become a nearly annual rite of spring.[3] Moreover, the decision contradicts *Hill*, 482 U.S. at 459, where standing was based on past prosecutions more remote than these.

The holding that there was or could be no genuine fear of future prosecution because the prior citations had been discontinued belies the fact that there had been repeated prosecutions. No one should be subject to such repeated citations, regardless of whether they lead to conviction, without a right to redress constitutional rights in a federal court.

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[3] The Complaint alleges that petitioner's fears of prosecution are heightened by reports of other cities prosecuting natural landscapers. The reports of such prosecutions are wide spread and well published. *See, e.g.*, P. Sabastian, *Mowers, Growers Now Quarreling Over the Back Fence—New Little Wildlife Habitat Pop-Up Like Daffodils; Cultivators Are Vexed*, WALL.ST.J., Apr. 17, 1991 at §1, p.1; J. Nash, *Gardening Nature's Way; Back-To-Natives Movement Bringing Ecological Harmony To the American Backyard*, TIME, May 17, 1993 at 55-57 (writing of Schmidling that "[a]lthough his enclave is concealed behind a high fence, [some neighbors] have reported him to the city, charging that his secret garden is an overgrown mess.") In Germantown, Wisconsin, two police officers accompanied a city crew to cut down the natural landscape of Curtis and Judy Crane. T. Cioni, *The Unkindest Cut Of All*, MILW.J. at B1 (Aug. 25, 1993).

The court also dismissed the facts that Clark and Schmidling built fences and planted trees to shield their landscapes from public view, holding that such actions do not evidence injury because any fears causing these steps were imaginary. But, standing limitations are intended to assure that parties have the incentive to make a real contest of a case, providing courts with a better chance of making an informed decision. Faced with an ordinance believed to be unconstitutional, a person can continue the action and be afraid of prosecution or alter his conduct in an attempt to minimize prosecution.

The Court of Appeals' distinction of the *Wojciechowski* case is also faulty. Because she is simultaneously being prosecuted for having debris on her property, the court reasoned, her prosecution under the weed ordinance is different and also does not justify genuine fears by petitioners. Chicago, however, has distinct statutes, a weed ordinance and a debris ordinance. Prosecution under one should have nothing to do with prosecution under the other.

Moreover, the holding that Wojciechowski's prosecution "does not necessarily mean the City will definitively prosecute plaintiff," App. A at 8, so far departs from this Court's accepted standard as to call for the exercise of this Court's supervisory power. The court of appeals sets an impossible hurdle for petitioners in establishing standing. Prosecution of an individual engaged in the same conduct is sufficient to show a genuine fear. *Steffel*, 415 U.S. 452; *Doran v. Salem Inn*, 422 U.S. 922 (1975). No one can ever establish a future event "definitively." By creating such a standard for establishing a genuine fear of prosecution, the Court of Appeals guarantees that no one will have standing to challenge a statute in a non-fundamental rights case in federal court because the only way to establish something "definitively" is for it to occur. If that happens, *Younger* applies. *Infra*, II.

II.

Satisfaction Of The Court Of Appeals Test For Standing Implicates *Younger v. Harris.*

Standing limits access to the federal courts. *Younger* abstention sends still others, for comity reasons, back to state court. These doctrines have, now, wrongly developed to the point, under *Schmidling*, where standing requires allegation of facts implicating *Younger*. Between the two there is no access to federal court.

Under *Younger*, a federal court must abstain where the plaintiff is subject to a pending criminal prosecution. *Younger v. Harris*, 401 U.S. 37 (1971). This Court has never precisely defined the commencement of a criminal prosecution. *See The Supreme Court*, 19 TERM, 85 HARV. L. REV. 40, 307 (1971) (suggesting the date of the "first official action against the individual" is the relevant date to determine if a state action is pending). Case law does not provide a bright line.[4]

If under *Younger*, the state prosecution begins before standing can be met under *Schmidling*, then, in a non-fundamental rights case, access to a federal court to challenge a municipal ordinance is now illusory. Clearly such

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[4] In some cases, it has been held that indictment or even arrest of the plaintiff prior to the filing of the federal action is not necessary for *Younger* to apply. Courts have an increasingly expansive notion of when prosecution begins. *See Potomac Electric Power v. Sach*, 802 F.2d 1527 (4th Cir. 1986) (*Younger* applies to target of state grand jury investigation even though no indictment has been issued or arrest made); *DeSpain v. Johnson*, 731 F.2d 1171 (5th Cir. 1984) (state welfare agencies request for *ex parte* order to investigate allegations of child abuse constituted "ongoing state prosecution"); *but see Monaghan v. Deakins*, 798 F.2d 632 (3rd Cir. 1986) (abstention not proper merely because federal plaintiff was the target of an ongoing state grand jury investigation); *Almodavar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987) (probation is not a "pending criminal prosecution").

a result confounds fundamental notions of justice and the principal of the right to access to federal court for the redress of federally protected rights. *See New Orleans Pub. Serv. v. Council of New Orleans*, 491 U.S. 350 (1989); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-1410

JACK SCHMIDLING, MIKE REGENFUSS, LARRY CLARK, et al.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a municipal corporation and RICHARD M. DALEY, in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 3506—**Harry D. Leinenweber**, Judge.

ARGUED NOVEMBER 12, 1992—DECIDED JULY 22, 1993

Before MANION and ROVNER, *Circuit Judges*, and REYNOLDS, *Senior District Judge.**

MANION, *Circuit Judge.* Jack Schmidling, Mike Regenfuss, Larry Clark, Debra Lynn Petro, and Rick Hyerczyk ("plaintiffs"), reside in the City of Chicago and cultivate natural gardens on their property. They sued the City

* Hon. John W. Reynolds, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

of Chicago and Mayor Richard M. Daley[1] ("defendants") in federal court claiming a "genuine fear" of prosecution under the City's so-called weed ordinance, Municipal Code of Chicago § 7-28-120 (1990), which requires persons owning or controlling property within the City to keep the weeds on their property at an average height not exceeding ten inches. The district court dismissed the lawsuit because the plaintiffs lacked standing to sue. As an alternative ground for dismissal, the district court cited the doctrine of federal court abstention enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). The district court also denied Schmidling and Clark leave to file a second amended complaint. The plaintiffs appeal, and we affirm.

I. Background

The plaintiffs live in Chicago. Rather than having traditional lawns and gardens on their property, they maintain natural landscapes that include a variety of native Illinois wild flowers and prairie plants. The City of Chicago has a weed ordinance, which states in relevant part:

> (a) Any person who owns or controls property within the city must cut or otherwise control all weeds on such property so that the average height of such weeds does not exceed 10 inches. Any person who violates this subsection shall be subject to a fine of not less than $50.00 nor more than $150.00. Each day that such violation continues shall be considered a separate offense.
>
> (b) All weeds which have not been cut or otherwise controlled, and which exceed an average height of 10 inches, are hereby declared to be a public

[1] The district court properly dismissed Mayor Daley, sued in his official capacity, as a party to this action. A lawsuit against Mayor Daley in his official capacity is the same as a lawsuit against the City of Chicago. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Consequently, Mayor Daley is not a party to this appeal.

> nuisance. If any person has been convicted of violating subsection (a) and has not cut or otherwise controlled any weeds as required by this section within 10 days after the date of the conviction, the city may cause any such weeds to be cut at any time. In such event, the person who owns or controls the property on which the weeds are situated shall be liable to the city for all costs and expenses incurred by the city in cutting the weeds.

Municipal Code of Chicago § 7-28-120(a)-(b) (1990).

In June 1991, the plaintiffs sued the defendants in federal court. In their first amended complaint, the plaintiffs sought both a declaratory judgment that the current weed ordinance is unconstitutional and a permanent injunction against the enforcement of the ordinance. They alleged that the ordinance denies them due process because it is vague and ambiguous; in particular, they claimed it fails to define the term "weed" or the term "average" and does not delineate the manner in which the "average height" of the weeds should be measured. The plaintiffs further alleged that because of its ambiguity and vagueness, the ordinance fails to give adequate notice of prohibited conduct and, thereby, invites arbitrary and discriminatory enforcement. Furthermore, they claimed the ordinance denies them equal protection of the law because it is not rationally related to any legitimate governmental interest.

Although not alleged in their first amended complaint, the plaintiffs state in their Initial Brief that the plants used in natural landscapes generally grow taller than ten inches in height. Apparently, the height of the plaintiffs' plants, not to mention the appearance of their plants, is one of the implicit reasons the plaintiffs are concerned the City will prosecute them under the current weed ordinance. (We make this point to give context to their lawsuit with respect to the ordinance and to note the omission from their first amended complaint.)

To demonstrate their standing to sue, the plaintiffs claimed they "genuinely fear" the City will prosecute them under the current weed ordinance. Although three of the plaintiffs (Regenfuss, Petro, and Hyerczyk) have never been cited or prosecuted under any weed ordinance, the City has cited Clark and Schmidling in the past. In 1984 and 1987, the City cited Clark for allegedly violating the previous version of the weed ordinance,[2] and the City cited Schmidling under the same ordinance in 1987, 1988, and 1989. The City dropped each charge, however, before either man was fined or penalized. Although the plaintiffs do not explain the details behind the dismissal of the charges against Clark, they do allege that the City dropped each citation against Schmidling after receiving a letter from him explaining his reasons for cultivating his natural garden.

The plaintiffs also claimed they "genuinely fear" prosecution because the City is currently prosecuting another natural gardener, Marie Wojciechowski, a nonparty to this

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[2] The version of the weed ordinance that preceded the current version stated in pertinent part:

> 99-9. All weeds including weeds which due to pollination are a menace to health and weeds otherwise injurious to public health or welfare are hereby declared to be a public nuisance.
>
> It shall be unlawful for any person owning or controlling any plot of ground to permit the growth of such weeds thereon.
>
> All such weeds shall be cut, pulled, destroyed or chemically sprayed . . . by the owner or person in control of said plot of ground at least twice a year. . . .
>
> The failure to destroy such weeds within the designated periods shall constitute a violation of this section.
>
> When the owner or person in control of any plot of ground fails to destroy or spray weeds growing thereon as provided herein, the city official charged with the enforcement of this section shall destroy the said weeds, and any expense incurred by the city in so doing shall be a charge against the owner so failing, which may be recovered in an appropriate action in law instituted by the corporation counsel.

Municipal Code of Chicago § 99-9 (1970) (amended to current form Dec. 20, 1989).

lawsuit. The City first prosecuted Wojciechowski under the earlier weed ordinance in 1989. According to the plaintiffs' first amended complaint, "[a]fter a trial on the merits, the judge ordered Ms. Wojciechowski to clean up certain debris in her yard, cut the plants so that they would not encroach on her neighbors [sic] yard and pay a $110.00 fine and court costs." In 1990, the City began its second prosecution of Wojciechowski under the current weed ordinance.[3] This prosecution was pending when the plaintiffs filed their federal suit.

The plaintiffs further claimed the City selectively enforces the weed ordinance. Although the City is prosecuting Wojciechowski, they claimed it has not prosecuted the following government agencies that also maintain natural landscapes: the David Lee Animal Control Center, the Illinois Department of Transportation, the Cook County Forest Preserve, and the Chicago Park District. Moreover, the plaintiffs alleged that other villages and municipalities have ordinances that prohibit weeds in excess of a certain height and that natural gardeners have been subject to prosecution under those ordinances. The plaintiffs offered no specifics, however, about which villages and municipalities have such ordinances and about which

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[3] Because the plaintiffs do not give any specifics in their first amended complaint or in their appellate briefs about the current prosecution of Wojciechowski, we have reviewed the initial complaint and first amended complaint in her state-court suit on our own initiative. *See Green v. Warden*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983). The City is charging Wojciechowski with having weeds in excess of ten inches in height on her property, thereby causing a public nuisance, and with storing pieces of lumber and stacks of bricks on her property. *City of Chicago v. Wojciechowski*, No. 90-MCI-322079 (Cir. Ct. Cook County, Ill.). The fact that the City is prosecuting Wojciechowski for having bricks and lumber on her property separates her situation from the pristine gardeners who carefully nurture their yards. The second prosecution against Wojciechowski appears to have resulted from her not doing what the state trial judge ordered her to do after her first prosecution. As of oral argument, Wojciechowski's case was still pending in the Cook County Circuit Court.

natural gardeners have been prosecuted under those ordinances.

Despite the plaintiffs' allegations of a "genuine fear" of prosecution, there are no pending citations against any of them for violating the current weed ordinance. None of the plaintiffs has ever been fined or penalized under either version of the weed ordinance, and the City has never threatened to enforce the current weed ordinance against any of the plaintiffs.

In November 1991, the defendants moved to dismiss the first amended complaint on the ground that the plaintiffs lacked standing to maintain the lawsuit. Relying on *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), the district court granted the motion because the plaintiffs had not alleged that their "genuine fear" of prosecution caused them any immediate coercive consequences. In addition, the district court *sua sponte* granted the motion to dismiss on the alternative basis of *Younger* abstention. The court ruled that abstention was apropos in light of the City's ongoing prosecution of Wojciechowski. The court wrote: "It would be an unwarranted interference in federal-state relations for this court to interpret a municipal ordinance and decide its constitutionality at a time that a state court is in the process of doing the same thing."

The plaintiffs then moved the district court to reconsider the judgment against them or, in the alternative, for leave to allow just Schmidling and Clark to file a second amended complaint to correct the pleading defects regarding standing. In the proposed second amended complaint, Schmidling and Clark alleged that the threat of enforcement (the past tickets and the pending prosecution of Wojciechowski) had immediate coercive consequences on them. As examples of these consequences, Schmidling and Clark alleged, among other things, that they both erected fences around their yards to block the view of their natural landscapes from the street and that Schmidling refrains from cultivating a natural garden on his front yard, even though

he has useable land. The district court denied the motion to reconsider and the motion to amend the complaint. This timely appeal followed.

II. Analysis

We have jurisdiction, 28 U.S.C. § 1291, to consider the three issues the plaintiffs raise on appeal. First, whether the district court erred in dismissing their lawsuit on the ground that they lacked standing. Second, whether the district court erred in basing its dismissal on the alternative ground of *Younger* abstention. Third, whether the district court abused its discretion in denying Schmidling and Clark the right to file a second amended complaint.

A. Standing

To invoke a federal court's jurisdiction, a litigant must establish the existence of a case or controversy. U.S. Const. art. III, § 2; *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). To set forth the requisite Article III case or controversy, the litigant "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). A litigant " 'does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' " *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

The injury, however, cannot be abstract. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). "It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct." *Id.* "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Id.* Of course, "[t]he difference between an abstract question and a 'case or controversy' is one of degree . . . and is not discernible by

any precise test." *Babbitt*, 442 U.S. at 297; *accord Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

In addition, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.' " *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A litigant must clearly and specifically set forth these Article III standing requirements with sufficient facts, because "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Id.* at 155-56.

In their first amended complaint, the plaintiffs did not allege any actual injury; as a result, we examine *de novo* their first amended complaint to determine whether they have alleged a sufficiently immediate threat of injury. *See Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991). In so doing, we accept as true all the material allegations in the complaint and construe the complaint in favor of the plaintiffs. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Prince*, 940 F.2d at 1106.

The plaintiffs alleged that they have a "genuine fear" of prosecution under the current weed ordinance specifically because the City has ticketed two of them in the past for allegedly violating the previous version of the weed ordinance and because the City is currently prosecuting Wojciechowski under the present version of the ordinance.

Even though the City is prosecuting Wojciechowski under the current version of the weed ordinance, that does not necessarily mean the City will definitively prosecute the plaintiffs.[4] *Wisconsin's Envtl. Decade, Inc. v. State Bar*

[4] Although the plaintiffs claim that they and Wojciechowski engage in the same type of gardening behavior, the record is unclear regarding the similarity between her garden and those of all the plaintiffs. Also, the City cited Wojciechowski not only for having weeds on her property, but for storing bricks and lumber on her property as well. *Supra* note 3. The existence of the bricks and

(Footnote continued on following page)

of Wis., 747 F.2d 407, 412 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *People v. General Elec. Co.*, 683 F.2d 206, 210 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). To establish standing, the plaintiffs must also show that the City has threatened them with immediate prosecution under the current weed ordinance. *See Gladstone, Realtors*, 441 U.S. at 99; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The plaintiffs have failed to do so. The plaintiffs have instead claimed that the City ticketed Schmidling and Clark in the past for allegedly violating the earlier version of the ordinance. (The City dropped the tickets before either man was fined or penalized.) These allegations are deficient to establish a case or controversy.

In the first place, the ticketing of Schmidling and Clark is too attenuated in time to show a sufficiently immediate threat that the City will prosecute the plaintiffs. The plaintiffs brought their lawsuit in 1991. The last ticket Clark received was in 1987. The last ticket Schmidling received was in 1989. Since those dates, in addition to amending the ordinance, the City has neither prosecuted nor threatened to prosecute either man, *see, e.g.*, *O'Shea*, 414 U.S. at 495-96 (noting that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects"), and the City has never cited, fined, prosecuted, or threatened the other three plaintiffs with prosecution under either version of the ordinance. The plaintiffs may consider the new ordinance unacceptable and they apparently think they are violating it, but without a showing of imminent enforcement, they have no Article III injury.

In the second place, a violation under the earlier ordinance is different from a violation under the present ordi-

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[4] *continued*
lumber may have created some other hazard, nuisance, or health problem that motivated the City to issue the citation, and the existence of the bricks and lumber is a difference between Wojciechowski's situation and the plaintiffs' situation.

nance. The earlier ordinance set no height limit on weeds. The ordinance stated: "All weeds including weeds which due to pollination are a menace to health and weeds otherwise injurious to public health or welfare are hereby declared to be a public nuisance." Municipal Code of Chicago § 99-9 (1970) (amended to current form Dec. 20, 1989). In contrast, the current ordinance requires property owners or those who control property to cut all weeds so that their average height is no greater than ten inches. *Id.* § 7-28-120(a) (1990). Accordingly, Schmidling and Clark could have been subject to prosecution for violating the earlier ordinance, but not necessarily be subject to prosecution for violating the current ordinance. Thus, the allegations of the past tickets—absent allegations of any immediate threat of prosecution under the current ordinance—fail to show a realistic danger that the City will certainly prosecute the plaintiffs under the present weed ordinance. *See Babbitt*, 442 U.S. at 298; *O'Shea*, 414 U.S. at 495-96; *Wisconsin's Envtl. Decade, Inc.*, 747 F.2d at 412; *General Elec. Co.*, 683 F.2d at 209-10.

Moreover, although the plaintiffs have alleged that they have a "genuine fear" of being prosecuted, their allegations are inadequate to show that the City has caused that fear. We find no allegations in the first amended complaint that the City has threatened the plaintiffs in any way with prosecution under the current ordinance. For the purposes of determining standing, we are initially and primarily concerned with the threat of prosecution, not with a litigant's anticipation of it. *Gladstone, Realtors*, 441 U.S. at 99; *Warth*, 422 U.S. at 499. The reason: anticipation, fervor of advocacy, speculation, or even fear is not enough by itself to establish standing. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 252 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). A credible threat of direct injury to the litigant must exist. *See Babbitt*, 442 U.S. at 298; *O'Shea*, 414 U.S. at 494. As such, because the plaintiffs have not alleged sufficient facts to show that the City has threatened them with prosecution under the

current weed ordinance, we find their claims of "genuine fear" unrealistic. *Steffel*, 415 U.S. at 459; *O'Shea*, 414 U.S. at 494. Indeed, because the plaintiffs are not engaged in any constitutionally protected conduct or expression, this is not one of those cases where the mere existence of a law can under the correct circumstance serve as a sufficient threat in and of itself to give a litigant standing to sue. *Babbitt*, 442 U.S. at 298 ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' "); *e.g.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8-10 (1988) (a consortium of private clubs obtained standing to sue because its member associations could have established standing on behalf of their members who were suffering immediate or threatened injury to their associational rights because of the enactment of a law, even though none had been charged); *Epperson v. Arkansas*, 393 U.S. 97, 98-102 (1968) (biology teacher, although not yet charged criminally, obtained standing to challenge law that prohibited the teaching of evolution); *Kucharek v. Hanaway*, 902 F.2d 513, 516 (7th Cir. 1990) (sellers of sexually explicit materials obtained standing to challenge newly enacted obscenity statute based on their reasonable fear of prosecution, even though they were not charged criminally), *cert. denied*, 498 U.S. 1041 (1991). *But see Younger*, 401 U.S. at 42 ("[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. . . .").

In sum, we affirm the district court for granting the defendants' motion to dismiss. We do not find the allegations in the first amended complaint to have demonstrated that the plaintiffs are in real and immediate danger of sustaining some direct injury as a result of the operation or enforcement of the weed ordinance. *Babbitt*, 442 U.S. at 298; *O'Shea*, 414 U.S. at 494; *General Elec. Co.*, 683

F.2d at 210. Our reason for affirming the district court varies somewhat from the one the court advanced in dismissing the amended complaint. The district court relied on *Nuclear Engineering* to determine that the plaintiffs lacked standing. In that case, the Nuclear Engineering Company ("NEC") brought a federal suit after hearing the Illinois Attorney General announce at a press conference his intent to commence lawsuits at some future date against those persons, including NEC, whom he thought were violating Illinois environmental protection laws. *Nuclear Eng'g Co.*, 660 F.2d at 243-44, 252. We ruled that for NEC to establish standing based on this threat of future prosecution, it had to show that "the threat of enforcement [had] immediate coercive consequences of some sort upon [it]." *Id.* at 252. Therefore, in applying *Nuclear Engineering*, the district court here determined that the plaintiffs lacked standing because they did not demonstrate some immediate coercive consequence. For the district court to have reached that conclusion, though, it had to first find that the City had threatened the plaintiffs with future prosecution under the current weed ordinance. Yet, based on our *de novo* review of the first amended complaint, we conclude that the City has not threatened the plaintiffs with either immediate or future prosecution under the current weed ordinance.

B. Abstention

The plaintiffs also argue that the district court erred in abstaining *sua sponte* on the basis of *Younger v. Harris*, 401 U.S. 37 (1971), which the court used as an alternative basis for granting the defendants' motion to dismiss. "Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984). Because we have already affirmed the district court on the basis that the plaintiffs

lacked standing to bring their lawsuit, we do not need to reach this point on appeal.

C. Motion to Amend

After the district court dismissed the plaintiffs' first amended complaint, the plaintiffs moved the court to reconsider the judgment against them. The court denied that motion. In the alternative, the plaintiffs moved for just Schmidling and Clark to file a second amended complaint to resolve the pleading defects the district court had noted in its order of dismissal. In that order, the district court stated that even though the plaintiffs had alleged a "genuine fear" of prosecution, they had to show that they suffered some immediate coercive consequences to achieve standing. In light of the court's conclusion, Schmidling and Clark alleged in their proposed second amended complaint that the threat of prosecution (the past tickets and the Wojciechowski suit) caused them to suffer immediate coercive consequences. For instance, they alleged that they had to build fences around their yards to block the view of their natural landscapes from the street. The court denied the motion to amend.

In their proposed second amended complaint, Schmidling and Clark rely on the same claims of threatened prosecution the plaintiffs raised in the first amended complaint, that is, the past tickets and the prosecution of Wojciechowski. We have already ruled that those allegations do not demonstrate a credible or realistic threat that the City will prosecute any of the plaintiffs under the current ordinance now or in the future. *See Babbitt*, 442 U.S. at 298. Thus, the actions Schmidling and Clark allege they have taken do not represent steps taken in response to some genuine threat of future prosecution, but represent steps taken in response to their speculative and imaginary fear of prosecution. *See, e.g., id.* If anything, these prudent measures reduced the possibility of prosecution under the current ordinance. Consequently, the district court did not abuse its discretion in denying the motion to file a

second amended complaint. *See Perkins v. Silverstein*, 939 F.2d 463, 471-72 (7th Cir. 1991); *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir. 1991).

III. Conclusion

The district court properly dismissed the lawsuit on the basis of standing; as such, we do not need to reach the abstention question. The district court also did not abuse its discretion in denying the motion to file a second amended complaint. Accordingly, the district court is AFFIRMED.

REYNOLDS, *Senior District Judge*, concurring. I disagree with the majority's conclusion that plaintiff-appellant Jack Schmidling lacks standing to challenge the Chicago weed ordinance. Schmidling was three times threatened with prosecution under the previous ordinance, the most recent citation having been issued in 1989, less than two years before this lawsuit was filed. The ordinance was amended in 1990, but not in any way that reduces the likelihood of Schmidling being cited again. Another natural gardener, Marie Wojciechowski (not a party to this action), has been cited and prosecuted under both versions of the ordinance, and her garden (or weed-patch, depending on your point of view) is identical to Schmidling's for purposes relevant to the weed ordinance.

Under these circumstances, I think Schmidling has established a "credible threat of prosecution," thereby satisfying the case or controversy requirement of Article III. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (two prior warnings to cease handbilling, combined with prosecution of plaintiff's "handbilling companion" create Article III controversy). The majority's characterization of Schmidling's fear of prosecution as

"speculative and imaginary" should be, and usually is, reserved for cases in which the plaintiff "feel[s] inhibited" by the mere existence of a law; it is not an appropriate characterization where the plaintiff has received actual, formal threats of prosecution. *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Steffel*, 415 U.S. at 459.

Nevertheless, I concur with the result reached by the majority because I believe plaintiffs have no hope of prevailing on the merits of their constitutional claims. Were the issue to be reached, the weed ordinance would be found neither unconstitutionally vague nor irrational.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Filed January 15, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK SCHMIDLING, MIKE REGENFUSS, LARRY CLARK, DEBRA LYNN PETRO and RICH HYERCZYK, Plaintiffs,	)	CASE NO. 91 C 3506
v.	)	
CITY OF CHICAGO and RICHARD M. DALEY, in his official capacity, Defendants.	)	JUDGE LEINENWEBER

MEMORANDUM OPINION AND ORDER

Plaintiffs, six Chicago homeowners who call themselves natural gardeners, reject traditional turf-lawn type yards in favor of natural landscapes employing native plants, wild flowers, legumes and grasses. City of Chicago ("City") ordinance Section 7-28-120 (the "weed ordinance") provides that "any person who owns or controls property within the City must cut or otherwise control all weeds on such property so that the average height of such weeds does not exceed 10 inches." Violators are subject to a fine of not less than fifty dollars nor more than one-hundred fifty dollars for each day of violation.

The amended complaint alleges that the City filed complaints for violation of the weed ordinance against two of the plaintiffs in the past. However, in each instance,

the prosecution was dropped after a letter of explanation was received by the City. The complaint further alleges that the City is currently prosecuting Marie Wojciechowski ("Wojciechowski"), a fellow natural landscaper, for violation of the weed ordinance. As a result of these past complaints and the ongoing prosecution, plaintiffs fear that they will in the future be prosecuted by the City for violating the weed ordinance. The amended complaint contends that the weed ordinance denies plaintiffs due process because the ordinance fails to define "weed" and is for that reason unconstitutionally vague. The amended complaint also contends that the ordinance denies equal protection of the laws to plaintiffs because the ordinance is not rationally related to a legitimate government interest. They seek declaratory judgment and an injunction.

The City has filed a motion pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) to dismiss the amended complaint because plaintiffs lack standing to maintain this suit and, in the alternative, their complaint fails to state a cause of action because the weed ordinance is not unconstitutionally vague and is, in fact, rationally related to a legitimate government interest.

The gist of the City's lack of standing argument rests on its claim that none of the plaintiffs have alleged an actual injury as a result of the weed ordinance so as to comply with the "case or controversy" requirement of Article III of the United States Constitution. The city argues that plaintiffs' "fear of prosecution" claim is insufficient to meet this actual injury requirement. It cites *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252 (7th Cir. 1981), in support. In response, plaintiffs argue that "a reasonable fear of prosecution is sufficient to meet the case or controversy requirement." They cite a number of cases from both the United States Supreme Court and the Seventh

Circuit in support, e.g., *So. Suburban Housing Ctr. v. Bd. of Realtors*, 935 F.2d 868, 878 (7th Cir. 1991); *Valley Forge Christian College v. Americans for Separation of Church & State*, 454 U.S. 464, 472 (1982); *Ohio Civil Rights Comm'n. v. Dayton Christian Schools*, 477 U.S. 619, 625 n.1 (1986); *Babbit v. United Farm Workers Union*, 442 U.S. 289, 298 (1979); and *Durharel v. Hanaway*, 902 F.2d 513, 516-7 (7th Cir. 1990).

In *Nuclear Engineering*, the plaintiff was engaged in hazardous waste disposal. The Illinois Attorney General stated at a press conference that he believed that the plaintiff was violating Illinois environmental protection laws and that he intended to commence a suit against the plaintiff. The plaintiff then filed its lawsuit against the attorney general for declaratory judgment and an injunction. The appeals court dismissed the lawsuit for failure to present a case or controversy. It held that if a plaintiff was going to rely on the threat of a lawsuit to create a justiciable controversy, the threat "must have immediate coercive consequences" on the plaintiff. In other words, the plaintiff must have succumbed to the pressure created by the threat by incurring costs or by altering its behavior in some manner against its will.

In this case, plaintiffs each allege that they feared prosecution but there is nothing in the amended complaint that in any way alleges that any of them had altered his behavior in any manner as a result of this fear. The amended complaint alleges that each plaintiff continues to cultivate his yard in its natural state in apparent disregard of his fear of prosecution under the weed ordinance. So it would appear that on the authority of *Nuclear Engineering* that plaintiffs fail to allege a case or controversy in the Article III sense, unless plaintiffs' cases require otherwise.

The cases relied upon by plaintiffs are readily distinguishable. In each of plaintiffs' cases, the "reasonable threat of prosecution" that created an Article III case or controversy stemmed from a statute that sought to inhibit constitutionally protected conduct, e.g., *Dayton Christian Schools* (religion), *Babbit* (speech and association), or there were allegations or evidence that the plaintiff was actually deterred from acting by the statute, e.g., *Kucharek v. Hanaway* (sale of pornographic materials), *So. Suburban Housing Ctr.* (affirmative marketing of real estate). On the contrary, plaintiffs here are not engaged in a constitutionally protected activity and have not modified their conduct in fear of prosecution under the weed ordinance.

There is an additional prudential consideration why this court should not get involved in determining the constitutionality of a municipal ordinance in this case. Plaintiffs make reference to the ongoing prosecution against Wojciechowski in the Circuit Court of Cook County for allegedly violating the weed ordinance. It would be an unwarranted interference in federal-state relations for this court to interpret a municipal ordinance and decide its constitutionality at a time that a state court is in the process of doing the same thing. Federal courts usually deny standing to contest the constitutionality of an ordinance or statute on vagueness grounds where the conduct regulated is of a type that could be regulated by a properly drawn statute, and where there is a state court interpretation of the ordinance or statute that cures the vagueness. *Younger v. Harris*, 91 S.Ct. 746, 752 n.4 (1971).

Accordingly, the motion of City of Chicago to dismiss pursuant to Rule 12(b)(1) for lack of jurisdiction is granted. The motion to dismiss Mayor Richard M. Daley, who is sued in his official capacity, is likewise granted. Suits

against a mayor in his official capacity are the same as those against the City itself. *Kentucky v. Graham*, 105 S.Ct. 3099, 3105 (1985).

IT IS SO ORDERED.

/s/ HARRY D. LEINENWEBER
HARRY D. LEINENWEBER, Judge
United States District Court

DATED: JAN 15 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Jack Schmidling, Mike Regenfuss, Larry Clark, Debra Lynn Petro and Rich Hyerczyk

v.

City of Chicago and Richard M. Daley, in his official capacity

Case Number: 91 C 3506

Judge Leinenweber

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the motion of City of Chicago to dismiss for lack of jurisdiction is granted. The motion to dismiss Mayor Richard M. Daley, who is sued in his official capacity, is likewise granted.

Date January 15, 1992

H. STUART CUNNINGHAM
Clerk

/s/ Wanda Parker
(By) Deputy Clerk